No. 11,561

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

NORTHERN TRUCK LINES, INC.,
a corporation,
Appellant,

vs.

EARL DUNN,
Appellee.

Upon Appeal from the District Court of the United States for the Territory of Alaska, Third Division.

BRIEF FOR APPELLEE.

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STATEMENT.

The Appellee generally accepts the jurisdictional statement and statement of the case submitted by the Appellant and hereby admits that it fairly presents the views and circumstances which give rise to the questions presented in this appeal, with the exceptions that the Appellant has failed to give full credit to the proof of the services rendered by the Appellee to the Appellant in obtaining the contracts for the Appellant, Northern Truck Lines, Inc. The Appellee further states, that the Appellant has tended to minimize the proof of the value of these two contracts obtained

by the Appellee for the Appellant, all of which was so forceably borne out by the evidence of the trial in the lower Court. The Appellee, therefore, wishes to state that it was the Appellee, Mr. Earl Dunn, by his natural ability as a promoter and salesman (Abst. 56), during the months of January, February, March and April of the year 1944, who obtained two very valuable trucking contracts for the Appellant, Northern Truck Lines, Inc., from the Civil Aeronautics Administration at Anchorage, Alaska. (Abst. 25.) One contract, No. 1429, earned a gross income for the Appellant of $7739.95 and the other, No. 1437, earned a gross income for the Appellant of $47,185.99, or a total of $54,929.94. (Abst. 35.)

The Appellee, Mr. Dunn, devoted the greater portion of three months of his time, efforts and services, and in addition he used his equipment and advanced moneys for living costs for himself and part of those of an officer of the Northern Truck Lines, Inc., in obtaining these trucking contracts without any other income than the prospects of sharing in the work and profits of these trucking contracts on a fifty-fifty basis. (Abst. 39, 58 and 62.) The Appellant admitted that the Appellee procured these contracts at the Appellant's request and stated that they were glad to get the contracts. (Abst. 81.)

After the aforementioned contracts had been awarded to the Appellant, Northern Truck Lines, Inc., one Mr. Meadows, who was President of the Northern Truck Lines, Inc., informed the Appellee, Mr. Dunn "They wouldn't need me anymore. It ap-

peared that they got the contracts and that was all they wanted of me." (Abst. 61.) Although Mr. Dunn on several occasions requested officials of the Northern Truck Lines, Inc., for loads, they refused to permit him to participate in the performance of the contracts or to pay the Appellee any of the profits therefrom. (Abst. 48, 49, 53 and 58.)

The Appellant, Northern Truck Lines, Inc., performed the contracts and were paid the sum of $55,-929.94 by the Civil Aeronautics Administration. (Abst. 35.)

The Appellee, as aforesaid, never received any compensation from the Appellant, Northern Truck Lines, Inc., for procuring these valuable contracts nor was he permitted to do any hauling on these contracts with his own trucks. As a result, he was deprived of any compensation for his services, use of his equipment and money advanced in obtaining said contracts.

The Appellant, Northern Truck Lines, Inc., refused to reveal or disclose the profits derived from the performance of the two contracts although ofttimes requested by the Appellee (Abst. 58), and since the Appellant left the Appellee entirely out of the picture by its refusal to disclose the profits or to pay him for his services, the Appellee had no other choice but to sue for the reasonable value of his services and labor used in obtaining these contracts for the Appellant, Northern Truck Lines, Inc.

BRIEF.

I.

Where the performance of a contract by the contractor has been prevented by the other party and the work done up to that time has been done in compliance with the terms of that contract and there is nothing in the contract by which the compensation for the part performed can be determined, the measure of recovery by the party performing that portion of the contract is for the reasonable value of the work, time and the materials furnished.

Jobst v. City of Danville, 212 Ill. App. 523;
Puterbaugh's Common Law Pleadings, 10th Ed., page 169, note 89;
Thorp v. Jackson (Sup. Ct. of Oregon), 165 Pacific 589.

II.

When the Plaintiff does not bring his action upon an express contract but upon the common counts and the Defendant denies the making of the express contract, then the Plaintiff is not confined to the express contract for recovery but may sue upon *quantum meruit* or upon any other ground which he can establish and any evidence which would be competent to establish his cause of action in the absence of an express contract, is competent to prove *quantum meruit.*

Edw. Thompson v. Decker, 200 Ill. App. 179;
Humphreys v. Orrey, 220 Ill. App. 523;
Sessions v. Pacific Improvement Company, 206 Pacific 653;

Thorp v. Jackson, 165 Pacific 589;
Hogan v. Rosenthal, 111 N.Y. Supp. 676;
Baruch v. Giblin, 164 So. 831.

ARGUMENT.

I.

The Appellee based his cause of action upon the oral contract which he made with the Appellant company with the understanding that he was to be paid by participating in the performance of the contracts and fifty per centum of the profits to be earned from the two Civil Aeronautics Administration contracts (Abst. 39, 58 and 62). As was proven from the evidence, the contracts were obtained by the Appellee and once they were secured in the Appellant corporation's name, the Appellant corporation then excluded him from participating in the performance of said trucking contracts or from sharing in the profits derived from the completion of said contracts.

If, under the law, the Appellee were compelled to seek under the terms of the oral contract, it would not be at all unreasonable to believe that the Appellee's compensation would be greatly in excess of the sum of $1500.00, or the amount which he asked for and recovered in the lower Court. Conformant to practice and procedure provided in such a case the Appellee sued in *quantum meruit* and from the testimony of the defendant in his admission that they were paid the sum of $55,925.94 by the Civil Aero-

nautics Administration (Abst. 35), the sum of $1500.00 for the obtaining of such valuable contracts in a cause of action, upon the *quantum meruit* theory, is not unreasonable and because of the gross sum of $55,925.94 having been paid to the corporation, is proof in itself, of the reasonable value of the services rendered to the corporation by the Appellee in obtaining said contracts.

The Appellee proved that there was an oral contract and under said contract he was entitled to 50% of the profits. (Abst. 39, 58 and 62.) The Appellee further proved the value of said contracts and his services rendered in obtaining the contracts, in that the proof produced at the trial, went to the Jury and Jury found that under the oral agreement which the Appellee had with the Appellant, he was entitled to the reasonable value of his work and services in obtaining the contracts when they rendered a verdict of $1500.00, or the amount the Appellee sued for, in *quantum meruit*. (Abst. 131.)

The Appellant corporation did not attempt to preclude the Appellee from any type of representation he chose to use in obtaining the contracts which was admitted by Mr. Haugen (Abst. 74, 76 and 81) and the Appellant further admitted that they were glad to obtain the contracts (Abst. 81) but immediately upon the contracts being firmly obtained in the Appellant's name, Northern Truck Lines, Inc., the President, Mr. Meadows, told him that they wouldn't need him anymore (Abst. 61) and whenever the Appellee made requests for loads he was always advised by

Mr. Haugen that he didn't have a load that day (Abst. 48 and 49) yet the Appellant never paid the Appellee for his services in any way whatsoever. Therefore, it was by reason of the breach of the oral contract and the prevention of its performance by the Corporation that the Appellant received absolutely nothing for his services in procuring the Civil Aeronautics Administration contracts and the Appellant corporation was unjustly enriched from the Appellee's personal work and services.

The Appellee after having made several requests of the Appellant and admitted by the defendant's manager, Mr. Haugen (Abst. 114), sued the truck lines upon the *quantum meruit* theory for the reasonable value of his services and equipment used in procuring the trucking contracts. In this respect he proved that his services were performed and the Appellant corporation, by and through its manager, Mr. Haugen, admitted that it was solely through the efforts of the Appellee (Abst. 81) that the contracts were obtained. In spite of the value of these contracts to the Appellant corporation, Northern Truck Lines, Inc., it absolutely refused to pay the Appellee anything for his services rendered.

In this case being considered, the defendant was apprised in advance by the complaint (Abst. 3 and 4) that the plaintiff considered the reasonable value of his services to be worth the sum of $1500.00 and proved by his own testimony that he came to Alaska from Dawson Creek in January of 1944 (Abst. 37) which was admitted by Mr. Haugen, manager of the

defendant corporation (Abst. 74) and the fact that the contracts were not signed until April 15 as is proven by the date of their execution, discloses that a greater portion of 4 months was used by Mr. Dunn in obtaining them. The Appellant corporation, by the pleadings, were apprised of the demands of the plaintiff and since the Appellant has not taken exceptions upon Appeal as to any irregularities of the trial of the case in the lower Court with the exception as to proof of reasonable value and the instruction of the Court upon the theory of *quantum meruit,* the Appellant was not prejudiced.

The Appellant has cited the case of *Southwestern Arizona Fruit and Irrigation Company v. Cameron,* 141 Pac. 572, as being in point and supporting the theory of the case that the Appellee did not prove the reasonable value of the services rendered to the Appellant by the Appellee. In this respect, we wish to take exception to such interpretation since in that case the facts are that the plaintiff sued in *quantum meruit,* after part performance of the contract and after he had received certain moneys from the defendant. In that case the plaintiff sued in *quantum meruit* and not upon the contract for a balance which he alleged to be due and owing to him under the express contract. In that case the plaintiff failed to prove that there was any balance due under the terms of the contract and naturally he could not recover in any action upon any theory, and therefore, the Court found that there was not sufficient evidence to sustain proof of a balance owing to plaintiff in *quantum meruit* or otherwise.

In the case being considered upon Appeal, the Appellee has proved certain services and bids (Abst. 83), and the contracts themselves and the Appellant has admitted that the Appellee has proved certain services and bids for and on behalf of the Appellant and the Appellant has never paid the Appellee one penny for his services rendered to the Appellant in obtaining these contracts. Therefore, the facts of the case in 141 Pac. 572 are not in point with the present case and should, therefore, be disregarded by the Court wherein the Appellant has cited "We know of no principle of law that would authorize a Jury, or a Court sitting as a Jury in the absence of evidence of value, arbitrarily to find a value." Appellee agrees with the Appellant that the findings of the Court in that case were well founded upon good principles of law but we cannot agree with the Appellant by any stretch of the imagination or conformant to accepted principles of law that the holdings in the *Southwestern Arizona Fruit and Irrigation Co. v. Cameron,* 141 Pac. 572 case is in point or an authority comparable with the case being considered upon appeal, since the facts are not analogous.

ARGUMENT.

II.

The Jury returned a verdict for the exact sum of money as alleged and claimed by the Appellee in his complaint. In a similar case with *Hogan v. Rosenthal,* found in 111 N.Y. Supp. 676, the plaintiff

brought an action for the sum of $324.31 for the fair and reasonable value of his services rendered to the defendant as a plumber. The Jury returned a verdict for $300.00 or $24.31 less than prayed for in the complaint. The defendant brought the defense that he was not to pay more than $150.00 for the contract. The Jury refused to credit this special defense "* * * and the fact for some reason they did not give the plaintiff the full amount of his unliquidated claim is not a subject for complaint on the part of the defendant" and the verdict was permitted to stand as found in the lower Court. Thus, we can see that it is the Jury who finds the reasonable value of services rendered in an action of *quantum meruit* and not what is alleged in the complaint.

In the present case, the plaintiff alleged the reasonable value of his services to be the sum of $1500.00. The Jury found after having considered the evidence that his services rendered to the Appellant were worth the sum of $1500.00.

In 5 *Corpus Juris,* page 141, Section 91, under the title Assumpsit, "Amount of Recovery", we find the following:

> "A recovery of a larger amount than that stipulated in the special contract is not permissible. In no case where the action is for money had and received, goods sold and delivered, *or for work and labor performed,* which, from the nature of the contract itself furnishes the standard of assessment, are the Jury allowed to give more than the amount received, with interest, or the value of the articles delivered, *or the services rendered.*"

Hence, the Appellant's contention that the Jury could have just as easily found $2500.00 as $1500.00 cannot be supported by the law or the practice. (See Appellant's Brief.)

Where the Appellant, Northern Truck Lines, Inc., after making an oral agreement with the Appellee, Earl Dunn, to obtain hauling contracts for them and the Appellant repudiates the oral contracts upon which it was agreed that the Appellee and Appellant would share in the division of the work and profits on a 50-50 basis, the action is one of *quantum meruit* and it is competent for the Appellee to produce any evidence to establish the reasonable value of the services.

When the plaintiff does not declare upon an express contract but upon the common counts, if the defendant denies the making of the express contract, then the plaintiff is not confined to the express contract for recovery and he may recover upon *quantum meruit* or any other ground which he can establish and any evidence which would be competent to establish his cause of action in the absence of an express contract, is competent. *Humphreys v. Orrey,* 220 Ill. App. 523.

Sessions v. Pacific Improvement Company, 206 Pacific, page 653. This was a suit brought by a broker for the recovery of commissions for the sale of land and is very much in point with the case now being considered on appeal, in that the plaintiff broker, did considerable ground work in promoting the sale of a tract of land to be used for a shipyard, and after the party whom the plaintiff had been negotiating with over a long period of time had entered into negotia-

tions with the defendant corporations who sold the land, the defendant corporations refused to pay him the commissions agreed upon in his contract. The broker then sued on the contract for $30,000.00 and also under the common count of assumpsit for $30,000.00 and the defendant claims that any verdict thereunder is vulnerable because of defects both of pleading and proof.

The lower Court found for the plaintiff and the Appellate Court held that the facts (page 663) "showing prevention of performance justifies an action in assumpsit and, while the broken contract cannot be set up to defeat the implied assumpsit, it is admissible in evidence to show how the cause arose, and to supply a measure of damages", and then cites *Breen v. Roy,* 97 Pac. 170; *Boyd v. Bargogliotti,* 107 Pac. 150; and 5 *Corpus Juris* 1388, paragraph 20, which refers to damages.

The Appellant had ample opportunity to introduce countervailing evidence, but there was no attempt to proffer the same either in the *Sessions v. Pacific Improvement Company* case which is here cited or the case now being considered on Appeal but the Appellant here likewise fails to avail itself of such proof.

The Appellate Court further held in the *Sessions* case (page 663) "He (meaning the plaintiff) was entitled to submit his entire case to the jury for determination upon the facts, and it was the province of the jury to decide which count was supported by the evidence."

In the case now being considered for appeal, the Appellee submitted his entire case *in assumpsit* under *quantum meruit* and asked for reasonable value. However, he proved the 50-50 oral contract which supported the reasonable value of his claim of services and the jury came in with a verdict for the amount claimed as reasonable value of said services in the sum of $1500.00.

The Appellate Court in the *Sessions* case further held (page 664):

> "The jury rendered a general verdict; and, if the evidence adduced on the whole case supports a verdict on either count, the verdict and the judgment entered thereon must stand."

In this case on appeal, the Appellee urges that since the jury in the lower Court considered all the "evidence adduced on the whole case supports a verdict, which they found in the sum of $1500.00, that the same verdict 'must stand' on appeal."

Among other points, the Appellate Court in the *Sessions* case found:

> "A statement of facts showing prevention of performance justifies an action in assumpsit; and, while the broker's contract cannot be set up to defeat the implied assumpsit, it is admissible in evidence to show how the cause arose, and to supply a measure of damages."

The Court found in the *Sessions* case that the broker may recover *in assumpsit* by showing prevention of performance and also stated the law:

> "A broker, who was in fact the primary procuring cause, will not be deprived of his commission merely because negotiations were completed through someone else and even perhaps without the broker having himself having met, or communicated personally with, the buyer."
>
> "Determination of question of fact by Jury will not be disturbed on appeal. As it is sometimes put in homely phrase in such cases, 'He who shakes the tree is the one to gather the fruit.' "

The Appellee was prevented in the present case from completing the contract by the Appellant and the Appellant denies that he had authority to make such a contract with the Appellee (Abst. 75) but later on in his testimony the Appellant corporation by and through Chris Haugen, its manager, admitted that he had authority to bind the corporation for Fifty or Sixty Thousand Dollars. (Abst. 85.) As alleged in the statement of facts, the contract was ultimately signed and performed and the Appellant enjoyed the privileges of performing a contract with a gross income of $55,925.94.

The Court further held in the *Sessions* case:

> "Contract employing broker, signed by acting general manager of the corporation, *held* to bind the corporation notwithstanding absence of written authorization to sign contract, since a de facto general manager may bind a corporation without express written authority."

The case now being considered on appeal is analogous to *Sessions v. Pacific Improvement Company*

and can be considered as being on all fours with the case here cited with the exception that the plaintiff broker had a written contract whereas in the case at bar, it was an oral contract.

Now, in the present case, as well as in the case of *Sessions v. Pacific Improvement Company,* it is not necessary that the Appellee sue under the original contract in order to prevail nor can the original contract be set up to defeat the implied assumpsit but it can be considered "to show how the cause arose, and to supply a measure of damages."

Where work and services have been performed under an oral contract, the laborer because of the default of the other party who has received the benefits may treat the contract as abandoned and bring an action under *quantum meruit* and the price for reasonable value of services and labor may be governed to some extent by the stipulations in the abandoned contract. *Edw. Thompson v. Decker,* 200 Ill. App. 179.

In *Puterbaugh's Common Law Pleadings and Practice,* 10th Ed., page 169, we find the following remarks and authorities cited in reference to the theory of *quantum meruit* under the title Assumpsit:

> "So where one performs in good faith the services called for by his supposed contract with a municipality which accepts them, it becomes liable under the common counts to pay the reasonable value thereof (Melluish v. City of Alton, 230 App. 250), thus, too, recovery may be had on a quantum meruit against the estate of a deceased

person for board and nursing furnished in his lifetime, notwithstanding the services were rendered under an agreement that payment would be made therefor by a testamentary provision, where no such provision was made. (Bross v. Ramsay, 216 App. 312.) In like manner, where one performed services under an oral contract that they are to be paid for by the conveyance of certain realty, which contract cannot be enforceable because within the statute of frauds, he may recover the value of the realty (Laymon v. Estate of Francis, 213 App. 82), and where one performs services upon a parole contract, which, being within the statute of frauds, cannot be enforced, he may recover the value thereof upon a quantum meruit. (Steel Works v. Atkinson, 68 Ill. 421; Folliott v. Hunt, 21 Ill. 654; Frazer v. Howe, 106 Ill. 563; Laymon v. Estate of Francis, 213 App. 82.) Where work is fully performed under a special agreement, but not precisely in accordance with the contract, there may be a recovery upon a quantum meruit. (Taylor v. Renn, 79 Ill. 181; Eggleston v. Buck, 24 Ill. 262.)"

In the case of *Thorp v. Jackson,* 165 Pacific, page 85, heretofore cited:

"The court found on appeal in an action on the quantum meruit against decedent's administratrix for services rendered decedent as a stenographer, though evidence of a contract between plaintiff and decedent was admissible, the agreement was not indispensable to recovery by the plaintiff, and plaintiff was entitled to have the

jury consider other testimony bearing on the reasonable value of her services."

The Appellee, by way of explanation of certain moneys had and received by him in the performance of another contract with the Morrison-Knutsen Company (Abst. 22, 23, 43 and 44), wishes to explain that although evidence was produced in the lower Court to establish the 50-50 partnership arrangement by which the Appellee was to perform part of the work and was to receive 50% of the profits is not to be considered in this case but such evidence was introduced to prove that the Appellant, Northern Truck Lines, Inc., did live up to its agreement with the Appellee, Mr. Earl Dunn, in the Morrison-Knutsen contract but absolutely refused the Appellee participation in the performance or to pay him any of the profits in the two large Civil Aeronautics Administration contracts or the basis for which this cause of action was originally brought and is now being appealed. The Morrison-Knutsen contract was an entirely different matter, having been fully performed and has no reference to the case on appeal whatsoever.

The Appellant has appealed upon two assignments of error, the first being that of the failure of the evidence proffered by the plaintiff to support the verdict of the "value of said services" and secondly, that one of the instructions given by the Court "fails to take into account that the witness, Haugen, denied any such partnership * * *" and since "the plaintiff was thoroughly impeached, it is a com-

plete defense to an action on a *quantum meruit.*" However, the Appellant admitted that the defense was not pleaded and the Appellee denies that such was proven by the Appellant during the course of trial in the lower Court. The Appellant further states that "The instructions complained of completely ignore this defense, which is a complete defense to the action. Furthermore, the plaintiff is precluded by his testimony from suing on *quantum meruit.*"

The Appellee is firmly convinced that the proof of the plaintiff proffered during the course of the trial in the lower Court, supported by arguments one and two, respectively, in this brief completely rebuts such allegations of Appellant and shows that the verdict was fully supported by the evidence.

The Appellee states that the second assignment of error in reference to the instruction given by the Court was properly given and that the Appellant's contention that the "plaintiff is precluded by his testimony from suing on *quantum meruit,*" is entirely erroneous and not supported by the law and general practice under Assumpsit and *quantum meruit* principle as the Appellee has proven by his citation of authorities and arguments hereinbefore set forth.

Further the citation by the Appellant of the case of *Carpenter v. Josey Oil Company,* cited at 26 Fed. (2d) 442-444, cannot be conceived to be in point with its contention since in that case the plaintiff had a firm and strongly worded written contract which made

him liable for all risks and defects in tools and casing which is not at all in point with the case now being appealed.

The Court found in the *Carpenter* case that the plaintiff tried to abandon his contract and sue on *quantum meruit,* thus attempting to collect from the defendant for wages, services and materials, indirectly that which he could not obtain or collect directly by his contract. The Court held that the action in such a case was upon the contract only and since he could not collect under the contract, he could not collect upon *quantum meruit.* The Court further found in the *Carpenter* case that "the oil company (defendant) has not been enriched or benefited." Here again that is not the case in our present case since the Appellant, Northern Truck Lines, Inc., were greatly benefited.

CONCLUSION.

The record conclusively shows that the Appellee has produced ample evidence to sustain his case and support the verdict he obtained in the lower Court.

The evidence proves, although denied by Mr. Haugen, that the Appellee brought Mr. Haugen, the manager of the Northern Truck Lines, Inc., to Anchorage in his own car where the contracts were obtained. The evidence shows that the Appellee used his own equipment, expended his own cash and paid his own expenses and those of an official of the Northern Truck Lines, Inc., for a period of some four

months in obtaining the two main contracts for the Northern Truck Lines, Inc., from the Civil Aeronautics Administration and as a matter of fact, the evidence discloses and proves, that it was Earl Dunn, the Appellee, who obtained by his own efforts all of the work which the Northern Truck Lines, Inc., did for the year 1944 and a portion of the year 1945.

The evidence further proves that after the contracts were obtained for the Northern Truck Lines, Inc., that one Mr. Meadows, acting as president of the corporation, came along and completely excluded Mr. Dunn from the work or the profits derived by the corporation in the performance of said contracts and refused to pay the Appellee anything for his efforts. Mr. Meadows further refused to recognize the oral working agreement made by his manager for a division of the profits and work and the agreed distribution of the work, thus depriving the Appellee of any compensation for his services or hauling which would enable the Appellee to make some money for his time and efforts in obtaining the two contracts.

The evidence shows that the Appellant, without permitting the Appellee to participate in the performance of the hauling contracts, completed the two Civil Aeronautics Administration contracts and that the Northern Truck Lines, Inc., were paid the sum of $55,925.94, without paying one cent to the Appellee for his services. The sum of $1500.00 is enough to be paid to the Appellee in light of the preponderance of the evidence fully proven.

Appellate Courts are reluctant in overriding the determination of the triers of the fact, especially in their finding of value (*Sessions* case, page 660) of the *quantum meruit* from facts already in the case. Fifty per cent of the money received for the two contracts involved in this case is well worth $1500.00 as per this verdict as it has been entirely proved.

The fifty per centum of the profits derived from the hauling contracts together with the energy, ingenuity and persistent efforts expended by the Appellee in procuring this work is all amply proven and supports the verdict.

Viewing the case in its entirety we conclude that the plaintiff was both legally and morally entitled to the compensation awarded him for it was through him as the moving cause that the interest which induced the Civil Aeronautics Administration to sign the two contracts and the resulting payment of the sum $55,925.94 thereon to the Appellant, Northern Truck Lines, Inc.

It was this awakening and the sustained interests by which the Appellee, Earl Dunn, induced the Civil Aeronautics Administration to sign the contracts without any break in continuity until the final consummation thereof which provided the contracts for the Appellant. It was the Appellee who shook the tree, and it would be a miscarriage of justice if he were to be deprived of the fruits of his labor.

We respectfully submit to the Court that no one of the Appellant's assignments of error has any merit; that the case was fully and fairly tried in

accordance with the established rules of practice and procedure and that the judgment of the District Court of the Third Division of the Territory of Alaska should be affirmed.

Dated, Anchorage, Alaska,
March 6, 1948.

Respectfully submitted,
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Attorney for Appellee.